

Filed 10/19/09 P. v. Greer CA2/5  
Opinion on remand from Supreme Court  
This is the third opinion for this docket number

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.
---

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

DONALD W. GREER,

Defendant and Appellant.

B205392

(Los Angeles County  
Super. Ct. No. BA280774)

APPEAL from a sentence of the Superior Court of Los Angeles County, Marsha Revel, Judge. Affirmed, in part, reversed, in part, and remanded with instructions.

Marcia R. Clark for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Paul M. Roadarmel, Jr., Supervising Deputy Attorney General, Daniel C. Chang, Deputy Attorney General, for Plaintiff and Respondent.

## INTRODUCTION

Defendant and appellant Donald Greer (defendant) pleaded no contest to charges of possession of a deadly weapon and possession of a controlled substance. After a lengthy delay, the trial court sentenced defendant to six years in state prison and awarded him 394 days of presentence custody credit. The trial court also issued a certificate of probable cause allowing defendant to challenge his sentence on appeal.

On appeal, counsel for defendant filed a brief pursuant to *People v. Wende* (1979) 25 Cal.3d 436 requesting this court to review independently the entire record. Defendant's counsel advised him of the nature of the brief filed on his behalf and of his right to file a supplemental brief. Defendant filed a handwritten supplemental brief contending, inter alia, that he was entitled to presentence custody credit for the entire period he was in custody awaiting sentence in this case, i.e., substantially more credit than awarded by the trial court.<sup>1</sup>

After reviewing the entire record, we requested that counsel of record for the parties file letter briefs addressing only the presentence custody credit issue raised by defendant's supplemental brief.<sup>2</sup> We received the parties' letter briefs and filed our opinion on January 23, 2009. Defendant then filed a petition for rehearing, which we granted on February 21, 2009.

We requested further letter briefing from the parties and, after review of those briefs, we hold that the trial court properly denied presentence custody credit for the period defendant was also remanded to custody in a subsequent, unrelated case. We

---

<sup>1</sup> Defendant made other contentions in his brief concerning his plea and unsuccessful motions to disqualify under Code of Civil Procedure sections 170.1 and 170.6 which contentions, as discussed below, are meritless.

<sup>2</sup> Defendant's request for judicial notice is granted. Based on our review of the entire record as required by *People v. Wende, supra*, 25 Cal.3d 436, we have identified a single arguable issue concerning the trial court's award of presentence custody credit, but there are no other arguable issues concerning defendant's judgment of conviction or sentence.

further hold that the trial court failed to award defendant presentence custody credit for the period of time from the date of defendant's arrest to the date he posted bail and for the period of time from the date he was remanded in this case to the date he was remanded in the subsequent, unrelated case. We also hold that the trial court must determine the date defendant was paroled or became eligible for parole in the subsequent, unrelated case and award defendant presentence custody credit from that date through the date he was sentenced in this case. We therefore reverse the award of presentence custody credit and remand this case to the trial court with instructions to amend the abstract of judgment to reflect the correct amount of presentence custody credit. Because there is no merit to defendant's other contentions, the judgment of conviction and sentence are, in all other respects, affirmed.

### **PROCEDURAL BACKGROUND**

Defendant was arrested in this case on March 6, 2005, and charged with possession of a deadly weapon and possession for sale of a controlled substance. According to the docket in this case, defendant posted bail on March 14, 2005.<sup>3</sup> On November 30, 2005, defendant entered a plea of no contest, but sentencing was thereafter delayed due, in part, to defendant's requests for continuances. Defendant apparently remained free on bail through the May 8, 2006, hearing in this case.

On May 19, 2006, however, defendant was arrested for committing four narcotics-related offenses (the second case [No. SA060525]). Defendant posted bail in the second case and was released from custody on or about May 20, 2006.

Less than a week later, on May 24, 2006, defendant was again arrested for committing narcotics-related offenses (the third case [No. LA052510]). He was arraigned in the third case on May 26, 2006, and remanded to custody in that case.

---

<sup>3</sup> We have obtained a copy of the trial court docket in this case and, on our own motion, take judicial notice of it. (Evid. Code, § 452, subd. (d); § 459.)

At a hearing in this case on June 2, 2006, the trial court exonerated bail and reset it at \$20,000 based on defendant's arrest in the third case. Defendant was remanded to custody in this case, and the trial court issued a "temporary commitment."

On June 8, 2006, a preliminary hearing was held in the third case. Because the People were unable to proceed, the trial court granted defendant's motion to dismiss the third case pursuant to Penal Code section 1385.<sup>4</sup>

On June 14, 2006, at the arraignment in the second case, the trial court noted that defendant had been arrested in a new case, apparently referring to the third case. The trial court in the second case exonerated defendant's bail, reset it at \$50,000, and remanded defendant to custody in the second case as well.

Defendant was apparently unable to make bail in either this case or second case and remained in presentence custody in both cases through sentencing in the second case. On January 26, 2007, the trial court in the second case accepted defendant's plea of nolo contendere as to count 1 and sentenced defendant pursuant to a plea agreement. The trial court denied probation and imposed a sentence of 16 months in any state prison on count 1. The remaining counts were dismissed pursuant to the agreement, and defendant was awarded 372 days of custody credit, comprised of 248 days of actual credit,<sup>5</sup> apparently for the time spent in custody in the second case, and 124 days of conduct credit. As to the 16-month sentence on count 1, the trial court indicated that it was "to run concurrent with any other time." Following pronouncement of sentence in the second case, a "temporary commitment issued."

In this case, defendant's custody status between the June 2, 2006, hearing at which defendant was remanded to custody and the December 11, 2007, sentencing hearing was consistently shown in the intervening minute orders as "remanded." It also appears that

---

<sup>4</sup> All statutory references are to the Penal Code.

<sup>5</sup> It is unclear from the record what dates the trial court used to calculate defendant's custody credit in the second case, but the 248-day period appears to include all of the time spent in custody from June 14, 2006, through January 27, 2007.

defendant was present in court in this case on several occasions between the January 26, 2007, sentencing hearing in the second case and the December 11, 2007, hearing in this case.<sup>6</sup>

On December 11, 2007, pursuant to a prior plea of no contest in this case,<sup>7</sup> the trial court sentenced defendant on count 2 to a total of six years in any state prison and on count 1 to two years in any state prison to run concurrently with the sentence on count 2. The trial court awarded defendant 394 days of presentence custody credit, consisting of 263 days of actual custody credit and 131 days of conduct credit. A handwritten calculation on the first page of the probation officer's report indicates that the 263 days of actual custody credit were calculated from March 25, 2007. But there is no indication in the record why defendant's actual custody credit in this case was calculated from that date.

Following his sentencing in this case, defendant filed a "Motion to Appeal" in the trial court. In response, the trial court issued a certificate of probable cause that "allow[ed] the defendant to proceed with his appeal of his sentence in this case."

---

<sup>6</sup> That defendant was able to appear repeatedly in the trial court in this case following the January 26, 2007, sentencing hearing in the second case suggests that defendant was remanded in the second case to county jail, not state prison, presumably to await sentencing in this case.

<sup>7</sup> As noted, on November 30, 2005, defendant entered a plea of no contest, but sentencing was put over to a later date. Pursuant to the plea agreement, a sentence of 10 years, suspended, and one year in county jail would be imposed, but it was conditional and would be imposed only if defendant appeared for sentencing and was not arrested and charged with any other offenses prior to sentencing. If, prior to sentencing, defendant failed to appear or committed another offense, the plea would convert to an open plea with a maximum sentence of 13 years, 8 months. As noted above, prior to sentencing in this case, defendant was arrested and charged in the second and third cases.

## **DISCUSSION**

### **A. Credit for the Period Defendant Was in Custody From his Arrest in this Case to the Posting of Bail**

Defendant was arrested in this case on March 5, 2005, and posted bail on March 14, 2005, but it does not appear that he was awarded any presentence custody credit for this period. Thus, defendant is entitled to nine days of actual custody credit for this period.

### **B. Credit for the Period Defendant Was Remanded to Custody in this Case but not Yet Remanded to Custody in the Second Case**

Defendant was remanded to custody in this case on June 2, 2006, and was not remanded to custody in the second case until June 14, 2006, but again it does not appear that the trial court awarded any presentence custody credit for this period. Defendant should therefore receive credit for the period between June 2 and 13, for a total of 13 additional days of actual custody credit.

### **C. Credit for the Period Defendant Was in Presentence Custody in the Second Case**

Defendant's counsel contends that he is entitled to additional presentence custody credit in this case for the entire period that he was simultaneously in custody in the second case—June 14, 2006, through January 27, 2007—notwithstanding that defendant received full credit for that same period against his sentence in the second case. According to his counsel, defendant's incarceration during that period “was attributable at least in part, to the instant case.” We disagree.

The presentence custody credit issue is controlled by section 2900.5 which reads in pertinent part: “(a) In all felony and misdemeanor convictions, either by plea or by verdict, when the defendant has been in custody, including, but not limited to, any time spent in a jail, camp, work furlough facility, halfway house, rehabilitation facility,

hospital, prison, juvenile detention facility, or similar residential institution, all days of custody of the defendant, including days served as a condition of probation in compliance with a court order, and including days credited to the period of confinement pursuant to Section 4019, shall be credited upon his or her term of imprisonment, . . . [¶] (b) For the purposes of this section, credit shall be given only where the custody to be credited is attributable to proceedings related to the same conduct for which the defendant has been convicted. Credit shall be given only once for a single period of custody attributable to multiple offenses for which a consecutive sentence is imposed.”

The Supreme Court in *In re Joyner* (1989) 48 Cal.3d 487 (*Joyner*) applied section 2900.5 in a factual situation analogous to this case. In that case, arrest warrants issued in California charging the defendant with robbery and grand theft. (*Id.* at p. 489.) The defendant was thereafter arrested in Florida for unrelated crimes committed in that state. (*Ibid.*) When the Florida authorities discovered the outstanding California arrest warrants, they placed a hold on the defendant at the California authorities’ request. (*Id.* at pp. 489-490.)

The defendant pleaded guilty to the Florida charges, was sentenced to concurrent terms of three years in Florida state prison, and received presentence custody credit for the entire time he was in custody in Florida prior to his sentencing there. (*Joyner, supra*, 48 Cal.3d at p. 490.) The defendant was then extradited to California where he pleaded guilty to the robbery and grand theft charges. (*Ibid.*) The California trial court sentenced defendant to a four-year prison term which ran concurrent to the Florida terms pursuant to section 669. (*Ibid.*) The California trial court, however, expressly denied the defendant’s request for presentence custody credit for the entire time he was in custody on hold in Florida and in custody in California. (*Ibid.*)

The defendant in *Joyner, supra*, 48 Cal.3d 487 filed a petition for a writ of habeas corpus that the Court of Appeal denied. (*Id.* at p. 490.) The defendant then filed a writ of habeas corpus in the Supreme Court which issued an order to show cause. (*Id.* at p. 491.) According to the defendant, he was entitled to “presentence custody credits against his California sentence for custody time in Florida and California from the date a ‘hold’ was

placed against him for the California offenses until he was sentenced in California, all of which time ha[d] already been credited against [the defendant's] Florida sentence.” (*Id.* at p. 489.) The Supreme Court characterized the issue before it as “the recurring troublesome question of when custody is ‘attributable to proceedings related to the same conduct for which the defendant has been convicted’ within the meaning of section 2900.5, subdivision (b).” (*Ibid.*)

In denying the defendant’s petition, the court in *Joyner, supra*, 48 Cal.3d 487 held that “a period of time previously credited against a sentence for unrelated offenses cannot be deemed ‘attributable to proceedings’ resulting in a later-imposed sentence unless it is demonstrated that the claimant would have been at liberty during the period were it not for a restraint relating to the proceedings resulting in the later sentence. In other words, duplicative credits against separately imposed concurrent sentences for unrelated offenses will be granted only on a showing of strict causation. Under this test, [the defendant] has not demonstrated entitlement to the credits he seeks.” (*Id.* at p. 489.)

In the instant case, defendant was awarded full custody credit in the unrelated second case for the time he spent in custody in that case from June 14, 2006, through his January 26, 2007, sentencing hearing. Thus, just as the defendant in *Joyner, supra*, 48 Cal.3d 487, defendant here is not entitled to duplicative credit for that time period against his sentence in this case because he cannot show that, but for this case, he would have been at liberty.

#### **D. Credit for the Period Defendant Was in Custody Between Sentencing Hearings**

The trial court awarded defendant presentence custody credit for a *portion* of the time he was in custody after the January 26, 2007, sentencing hearing in the second case awaiting sentencing in this case. Defendant contends that he is entitled to presentence custody credit for the *entire period* of time he was in custody in this case following the January 26, 2007, sentencing hearing in the second case. Based on the Supreme Court’s decision in *In re Rojas* (1979) 23 Cal.3d 152 (*Rojas*), we disagree.



In *Rojas, supra*, 23 Cal.3d 152, the defendant was convicted of manslaughter and sentenced to state prison. (*Id.* at p. 154.) A year later, he was charged with murder in an unrelated case. (*Ibid.*) The defendant was transferred from state prison to county jail to await trial in the murder case. (*Ibid.*) Following trial, the defendant was convicted of second degree murder and sentenced to state prison for the term prescribed by law to run concurrently with his prior sentence for manslaughter. (*Id.* at p. 155.) The defendant remained in county jail until the date of his sentencing in the murder case, a period of 207 days. (*Ibid.*)

The defendant filed a petition for writ of habeas corpus seeking presentence custody credit against the sentence in his murder case for the 207 days he spent in county jail awaiting trial on the murder charge. (*Rojas, supra*, 23 Cal.3d at p. 155.) The Supreme Court denied the petition, stating that “[t]he sole question is whether [the] defendant is entitled to a credit against his second degree murder sentence for the 207 days he spent in county jail while awaiting trial and disposition of that charge when he would necessarily have served that 207-day period in state prison for the original manslaughter conviction and when he was already receiving credit for that period against his original conviction. We conclude that the proper interpretation of Penal Code section 2900.5 denies [the] defendant the credit he seeks.” (*Rojas, supra*, 23 Cal.3d at p. 155.) According to the court in *Rojas*, “[t]here is no reason in law or logic to extend the protection intended to be afforded one merely *charged* with a crime to one already incarcerated and serving his sentence for a first offense who is then charged with a *second* crime. As to the latter individual the deprivation of liberty for which he seeks credit cannot be attributed to the second offense. Section 2900.5 does not authorize credit where the pending proceeding has no effect whatever upon a defendant’s liberty.” (*Rojas, supra*, 23 Cal.3d at p. 156.)

In this case, as in *Rojas, supra*, 23 Cal.3d 152, defendant was sentenced to state prison in the second case well before the trial court imposed sentence in this case. Under the reasoning of *Rojas*, the time he spent in custody after sentence was imposed in the second case cannot be attributed to the offenses charged in this case because, regardless

of those offenses, he would have been in custody due to the sentence in the second case. As the court in *Rojas* stated, “the pending proceeding [in this case had] no effect whatever upon defendant’s liberty” once the trial court imposed sentence in the second case on January 27, 2007. (*Id.* at p. 156.) Accordingly, defendant is not entitled to any credit in this case for the time he was serving his sentence in the second case. He should, however, receive credit in this case for time in custody after he finished his sentence in the second case, but before he was sentenced in this case.

Defendant was sentenced in the second case on January 26, 2007. The trial court in that case imposed a 16-month term and awarded defendant 372 days of presentence custody credit comprised of 248 days of actual credit and 124 days of conduct credit. Defendant was not sentenced in this case until December 11, 2007. At some point prior to the December 11, 2007, sentencing in this case, however, defendant became eligible for release on parole or was paroled in the second case. Thereafter, he remained in custody solely in this case. Thus, defendant is entitled to actual custody credit for the period of time from the date he became eligible for parole in the second case until the date he was sentenced in this case.

The record does not indicate the date defendant became eligible for parole in the second case. Accordingly, we remand the matter to the trial court to determine that date and to calculate the number of days of actual custody credit to which defendant is entitled for the period between his parole in the second case and his sentencing in this case.

#### **E. Other Contentions**

In addition to challenging his custody credits, defendant also contends that his guilty plea was not an open plea, but rather a negotiated plea pursuant to which defendant was to be sentenced to 10 years in state prison, suspended, and one year in county jail. According to plaintiff, the trial court therefore erred in finding that his guilty plea was open and in sentencing him to six years in state prison. In the alternative, defendant contends the trial court erred in not allowing him to withdraw his plea. Defendant also

argues that the trial court erred in denying his motions to disqualify under Code of Civil Procedure sections 170.1 and 170.6.

In accepting defendant's plea, the trial court expressly qualified its acceptance on two conditions: (i) defendant was required to appear for sentencing; and (ii) defendant was required to refrain from committing any further criminal offenses. Specifically, on November 30, 2005, the trial court explained the terms of the proposed plea as follows: "[The Court]: The People's offer was six years state prison. The defense counteroffer was suspended time. [¶] We were talking yesterday as far as—I think the [maximum sentence] is 13 years 8 months suspended if the court gave him probation. [¶] If there's any violation, he would go to prison for 13 years 8 months. [¶] I was thinking about it last evening as to whether there was a third alternative to that. And I was thinking of ten years state prison suspended, but a year in county jail to be put over until after the first of the year, so the defendant can be out during the holidays. [¶] *And if the defendant picked up any new case or didn't show up for sentencing, then it would be up to the 13 years 8 months.* [¶] If he showed up for sentencing, he would get ten years suspended, a year in county jail, be placed on probation." (Italics added.)

Defendant thereafter consulted with his counsel and indicated his willingness to accept the plea agreement proposed by the trial court. After defendant was advised of his rights, the trial court restated the terms of the plea. "[The Court]: Okay. I'm going to state it now once again, it was before the plea. I'll put it on the plea. [¶] *If the defendant shows up for sentencing and doesn't pick up any new case*, then on the date that he selects for the sentencing, which I think will be January 3rd, he will get ten years state prison suspended, be placed on three years' formal probation, and be remanded to start serving 365 days in county jail and be given terms and conditions of probation. If he violates any term or condition of probation, he goes to prison for ten years. [¶] *If he doesn't show up or picks up a new case, then he can get up to 13 years, eight months on the open plea.*" (Italics added.)

After restating the proposed plea, the trial court inquired whether defendant understood and agreed to the terms of the plea, and defendant replied in the affirmative.

“[The Court]: Is that your understanding, Mr. Greer? [¶] [Defendant]: Yes, Ma’am. [¶] [The Court]: And you agree to that? [ [Defendant]: Yes. [¶] [The Court]: Counsel join? [¶] [Defense Counsel]: Counsel joins.” The trial court then found as follows: “The court finds the defendant has knowingly and intelligently waived his constitutional rights. He [has] freely and voluntarily pled no contest and admitted the allegations. There [is] a factual basis for the plea and the admission[s].”

As discussed above, following defendant’s plea but before sentencing, defendant was arrested and charged in two separate criminal cases. At the sentencing hearing in this case, the trial court denied defendant’s motion to withdraw his plea and found that defendant’s plea had converted to an open plea under which the trial court had the discretion to impose a maximum sentence of 13 years, 8 months. The trial court then sentenced defendant to six years in state prison.

The record on defendant’s plea agreement is clear and unequivocal, and demonstrates that there is no factual basis for defendant’s contention that he did not agree to an open plea. The record reflects that defendant knowingly and voluntarily agreed that if he was arrested and charged with committing another offense prior to sentencing in this case, his plea would convert to an open plea. Thus, the trial court did not err in concluding that defendant’s plea had converted to an open plea based on his subsequent arrests. And, it did not err in refusing to impose the suspended 10-year state prison sentence, with one year in county jail, because under the plea agreement, defendant forfeited his right to that sentence when he was arrested and charged with the other two offenses. Nor did the trial court err in imposing a six-year state prison sentence because such sentence was within its discretion under the open plea. Similarly, the trial court did not err in refusing to allow defendant to withdraw his plea because the record establishes that the plea was knowingly and voluntarily entered and was supported by a sufficient factual basis.

Defendant’s challenges to the trial court’s denial of his motions to disqualify under Code of Civil Procedure sections 170.1 and 170.6 are equally unavailing. In those motions, defendant alleged that the trial court, Judge Revel presiding, was prejudiced

against him because Judge Revel had made rulings adverse to him and because defendant had filed a complaint with the Commission on Judicial Performance against her.

The rulings denying the motions to disqualify, however, are not appealable orders; they may only be reviewed by a writ of mandate. “The determination of the question of the disqualification of a judge is not an appealable order and may be reviewed only by a writ of mandate from the appropriate court of appeal sought only by the parties to the proceeding. . . .” (Code Civ. Proc., § 170.3, subd. (d).) We therefore have no jurisdiction to review the orders denying defendant’s motions. (See *People v. Brown* (1993) 6 Cal.4th 322, 333 [section 170.3, subdivision (d) precludes “a litigant from challenging a denial of a disqualification motion on appeal from a final judgment. [Citations.] In other words, . . . section 170.3 [, subdivision] (d) creates an exception to the general rule that interlocutory rulings are reviewable on appeal from a final judgment”].)

### **DISPOSITION**

The trial court’s decision not to award presentence custody credit for the period defendant was also in custody in the second case (No. SA060525) is affirmed. The trial court’s award of 394 days of presentence custody credit in this case is reversed, and the matter is remanded to the trial court with instructions to determine the date on which defendant became eligible for parole in the second case and to calculate the number of days of actual custody credit to which defendant is entitled for the period from that parole date to the date of sentencing in this case. The trial court should then award defendant the number of days of actual custody credit determined by that calculation, award an additional nine days of actual custody credit for the period from defendant’s arrest to the posting of bail, and award an additional 13 days of actual custody credit for the period between the date he was remanded to custody in this case and the date he was remanded in the second case. The trial court should aggregate defendant’s actual custody credit for

purpose of calculating the conduct credit to which he is entitled and amend the abstract of judgment to reflect the total presentence custody credit awarded.

In all other respects, the judgment of conviction and sentence are affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MOSK, J.

We concur:

TURNER, P. J.

ARMSTRONG, J.